Office - Supreme Court, U.S.
FILED
JUN 15 1984
ALEXANDER L. STEVAS,
CLERK

NO. 83-2071

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

STATE OF NEW JERSEY; BRENDAN T. BYRNE as Governor of the State of New Jersey; DEPARTMENT OF LAW AND PUBLIC SAFETY; JOHN J. DEGNAN as Attorney General of the State of New Jersey; EXECUTIVE COMMISSION ON ETHICAL STANDARDS; ANGELO BIANCHI, RICHARD MOUNT, WARREN SMITH, JACOB TAPOREK, EDWARD HOFGESANG and JOAN HABERLE as members of the Excutive Commission on Ethical Standards,

Petitioners,

v.

MARIJANE SINGER, JUDD LEVY, MARTIN BRODY, EDWARD A. JESSER, JR., ROBERT F. KELLEHER, FRANK K. KELEMAN, HARVEY MOSKOWITZ, LEONARD SCHWARTZ, FRED R. SULLIVAN, CARLETON A. HOLSTROM, EDWARD KRAMER and MAGDA S. LEUCHTER,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

IRWIN I. KIMMELMAN
Attorney General of New Jersey
Attorney for Petitioners, State of New Jersey; Brendan T. Byrne as Governor of the State of New Jersey; Department of Law and Public Safety; John J. Degnan as Attorney General of the State of New Jersey; Executive Commission on Ethical Standards; Angelo Bianchi, Richard Mount, Warren Smith, Jacob Taporek, Edward Hofgesang and Joan Haberle as members of the Excutive Commission on Ethical Standards
Richard J. Hughes Justice Complex
CN 112
Trenton, New Jersey 08625
(609) 292-4965

MICHAEL R. COLE
First Assistant Attorney General
Counsel of Record

WILLIAM HARLA
Deputy Attorney General
On the Petition

Adams Press Corp., 50 Park Place, Newark, New Jersey 07102—(201) 623-8611

32pp

Questions Presented

Whether plaintiffs who successfully challenge a State of New Jersey law on federal constitutional grounds without satisfying the jurisdictional requirements of 42 *U.S.C.* §1983 and who obtain a judgment clarifying the scope of the law are entitled to attorneys' fees under the "Civil Rights Attorney's Fees Awards Act of 1976," 42 *U.S.C.* §1988, even though the State defendants did not take or threaten to take action enforcing the challenged law and where the only harm complained of in the Complaint relates solely to the passage of the challenged law by the State Legislature for which that body, not named as a defendant, is entitled to absolute legislative immunity both from damages and attorneys' fees.

Whether "special circumstances" would render an award of attorneys' fees under 42 *U.S.C.* §1988 "unjust" in this case where the named State defendants did not take or threaten to take action to enforce a State law challenged by plaintiffs in what is functionally a simple declaratory judgment action.

Interested Parties

The parties set forth in the caption of this Petition for *Certiorari* are the interested parties.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
INTERESTED PARTIES	ii
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
ARGUMENT	9
The Court should grant certiorari to settle the unresolved issue of whether attorney's fees may be awarded under 42 *U.S.C.* §1988 even though none of the defendants took or threatened to take any action to enforce *L.* 1980, *c.* 79 which would subject them to liability under 42 U.S.C. §1983; also, attorney's fees should be denied in this case because there are "special circumstances" which would render an award of fees "unjust"	9
A. Plaintiffs are not entitled to an award of attorney's fees under 42 U.S.C. §1988 because they have not met the prerequisites for obtaining relief under any of the civil rights statutes listed in 42 *U.S.C.* §1988, specifically 42 *U.S.C.* §1983, which entitles a prevailing party to an award of attorneys' fees	10

PAGE

B. "Special Circumstances" would render an award of attorney's fees in this case "unjust" since the State defendants did not take action or threaten to enforce the challenged State law and since no such action was even alleged in plaintiffs' complaint 20

CONCLUSION 22

APPENDIX:

A—*L.* 1980, *c.* 79 of New Jersey 1a

B—*N.J.S.A.* 52:13D-21 ..... 5a

C—Veto Message to Senate Bill 1369 (1980), dated November 24, 1980 ..... 8a

D—*L.* 1980, *c.* 28 ..... 12a

E—*L.* 1980, *c.* 69 ..... 30a

F—*L.* 1980, *c.* 159 ..... 42a

G—Plaintiffs' Complaint Filed August 29, 1980 in the Superior Court of New Jersey 46a

H—Plaintiffs' Amended Complaint Filed September 25, 1980 in the Superior Court of New Jersey 70a

I—Defendants' Answer Filed October 17, 1980 72a

J—Oral Opinion of the Hon. George Y. Schoch, Judge, Superior Court, Issued November 25, 1980 ..... 78a

PAGE

K—Order Granting Summary Judgment Filed January 16, 1981 ..... 85a

L—Opinion of the Appellate Division, Superior Court Filed June 1, 1982 ..... 88a

M—Opinion of the New Jersey Supreme Court Decided March 19, 1984 ..... 93a

N—S. Rep. No. 1011, 94th Cong., 2d Sess., *reprinted in* 1976 U.S. Code Cong. & Ad. News 5908 ..... 110a

O—H.R. Rep. No. 1558, 94th Cong., 2d Sess. (1976) 122a

PAGE

Table of Authorities

Cases Cited

Adickes v. *S.H. Kress and Company*, 398 U.S. 144 (1970) 14, 15

Alyeska Pipleine Service Co. v. *Wilderness Society*, 421 *U.S.* 240 (1975) 10, 11, 13

Boyle v. *Landry*, 401 *U.S.* 77 (1971) 16

Chastang v. *Flynn & Emrich Co.*, 541 *F.*2d 1040 (4th Cir. 1976) 21

Consumers Union of U.S., Inc. v. *American Bar Ass'n*, 427 *F. Supp.* 506 (E.D. Va. 1976) (Consumers Union I) 8

Consumers Union of U.S., Inc. v. *Virginia State Bar*, 433 *U.S.* 917 (1977) (Consumers Union II) 8

Consumers Union of U.S., Inc. v. *American Bar Ass'n*, 470 *F. Supp.* 1055 (E.D. Va. 1979) (Consumers Union III) 8

Consumers Union of U.S., Inc. v. *American Bar Ass'n*, 505 *F. Supp.* 822 (E.D. Va. 1981) (Consumers Union V) 8

Consumers Union of U.S., Inc. v. *Virginia State Bar*, 688 *F.*2d 218 (4th Cir. 1982) (Consumers Union VI) 8, 16, 21

Coop v. *City of South Bend*, 635 *F.*2d 652 (7th Cir. 1980) 21

Criterion Club of Albany v. *Board of Comm'rs.*, 594 *F.*2d 118 (5th Cir. 1979) 21

Entertainment Concepts, Inc. v. *Maciejewski*, 631 *F.*2d 497 (7th Cir. 1980) 21

PAGE

Fialkowski v. *Shapp*, 405 *F. Supp.* 946 (E.D. Pa. 1976) 16

Flagg Brothers, Inc. v. *Brooks*, 436 *U.S.* 149 (1978) 14

Gilbert v. *Gladden*, 87 *N.J.* 275, 432 *A.*2d 1351 (1981) 22

Gras v. *Stevens*, 415 *F. Supp.* 1148 (S.D. N.Y. 1976) 16

Hensley v. *Eckerhart*, —— *U.S.* ——, 103 *S.Ct.* 1933, 76 *L.Ed.*2d 40 (1983) 21

Imbler v. *Pachtman*, 424 *U.S.* 409 (1976) 15

Konczak v. *Tyrrell*, 603 *F.*2d 13 (7th Cir. 1979), *cert. denied* 444 *U.S.* 1016 (1980) 21

Lucky Calendar Co. v. *Cohen*, 19 *N.J.* 399, 117 *A.*2d 487 (1955) 18

Lugar v. *Edmondson Oil Co., Inc.*, 457 *U.S.* 922 (1982) 20

Luria Brothers & Co., Inc. v. *Allen* 672 *F.*2d 347 (3rd Cir. 1982) 13, 14

Maher v. *Gagne*, 448 *U.S.* 122 (1980) 13

Maine v. *Thiboutot*, 448 *U.S.* 1 (1980) 13, 14, 19

Monell v. *Department of Social Services*, 436 *U.S.* 658 (1978) 15

Monroe v. *Pape*, 365 *U.S.* 167 (1961) 15

Naprstek v. *City of Norwich*, 433 *F. Supp.* 1369 (N.D. N.Y. 1977) 21

Newman v. *Piggie Park Enterprises, Inc.*, 390 *U.S.* 400 (1968) 10, 13, 20

O'Shea v. *Littleton*, 414 *U.S.* 488 (1974) 16

Rizzo v. *Goode*, 423 *U.S.* 362 (1976) 15

PAGE

Singer v. *State*, 95 *N.J.* 487, 472 *A.*2d 138 (1984) 1, 8, 12

State v. *Baird*, 50 *N.J.* 376, 235 *A.*2d 673 (1977) 18

Staten v. *Housing Auth. of Pittsburgh*, 638 *F.*2d 599 (3rd Cir. 1980) 21

Supreme Court of Virginia v. *Consumers Union of U.S., Inc.*, 446 *U.S.* 719 (1980) (Consumers Union IV) 8, 9, 16

Supreme Court of Virginia v. *Consumers Union of U.S., Inc.*, —— *U.S.* ——, 103 *S.Ct.* 3124 (1983) (Consumers Union VIII) 8, 18

Virginia State Bar v. *Consumers Union of U.S., Inc.*, —— *U.S* .——, 103 *S.Ct.* 3124 (1983) (Consumers Union VII) 8, 17, 18

Statutes Cited

STATE:

N.J.S.A. Cited

N.J.S.A. 2A:16-50 *et seq.* 18

N.J.S.A. 5:12-1 *et seq.* 5

N.J.S.A. 5:12-1.b(6) 5

N.J.S.A. 52:13D 4

N.J.S.A. 52:13D-12 *et seq.* 3

N.J.S.A. 52:13D-13(e) 3

N.J.S.A. 52:13D-16(b) 4

N.J.S.A. 52:13D-17.1 4

N.J.S.A. 52:13D-21(i) 4

PAGE

Chapter Laws Cited

L. 1980, *c.* 28 ..... 4, 5

L. 1980, *c.* 69 ..... 4, 5

L. 1980, c. 79 ..... 4-6, 9, 15, 18, 20, 22

L. 1980, *c.* 79, §2.e 4

L. 1980, *c.* 159 4

L. 1981, *c.* 142 6

Federal

28 *U.S.C.* §1257(3) 2

28 *U.S.C.* §2201 ..... 3, 23

28 *U.S.C.* §§2201 and 2202 ..... 11, 18

42 *U.S.C.* §1983 ..... i, 2, 3, 6, 7, 9, 10, 12-16, 18-20, 22

42 *U.S.C.* §1988 ..... i, 2, 3, 7-13, 16, 18-20, 22, 23

United States Constitution Cited

First Amendment 6

Fourteenth Amendment 6, 12, 14, 20

Congressional Reports

S. Rep. No. 1011, 94th Cong., 2d Sess., *reprinted in* 1976 U.S. Code Cong. & Ad. News 5908 21

H.R. Rep. No. 1558, 94th Cong., 2d Sess. (1976) 11, 13, 14

PAGE

Miscellaneous

N.J. Senate Bill 1068 (1980) 4, 5
N.J. Senate Bill 1069 (1980) 5
U.S. Senate Bill 2278 (1976) 12
U.S. House of Representatives Bill 9552 (1976) 12
Veto Message to N.J. Senate Bill 1369 (1980) 5

NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

STATE OF NEW JERSEY, *et al.*,

Petitioners,

v.

MARIJANE SINGER, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

Opinions Below

The opinion of the Supreme Court of New Jersey was decided March 19, 1984 and is reported as *Singer* v. *State*, 95 *N.J.* 487, 472 *A.*2d 138 (1984); it is reproduced as Appendix M (A93 to A109). The opinion of the Appellate Division of the Superior Court of New Jersey decided June 1, 1982 is unreported; it is reproduced as Appendix L (A88 to A92). The oral opinion of the Law Division of the Superior Court of New Jersey decided November 25, 1980 is also unreported; it is reproduced as Appendix J (A78 to A84).

Jurisdiction

The decision of the Supreme Court of New Jersey was entered March 19, 1984 (Appendix M, A93 to A109). This Petition for *Certiorari* is being filed within 90 days of that date. The jurisdiction of the Court is invoked under 28 *U.S.C.* §1257 (3).

Statutes Involved

The "Civil Rights Attorney's Fees Awards Act of 1976," codified at 42 *U.S.C.* §1988, provides in pertinent part that:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

42 *U.S.C.* §1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

28 *U.S.C.* §2201 provides:

> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954 or a proceeding under section 505 or 1146 of title 11, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

Statement of the Case

This case concerns an application for attorneys' fees under 42 *U.S.C.* §1988 of over $180,000. These fees were allegedly incurred by plaintiffs in obtaining a summary judgment without discovery or an evidentiary hearing in a declaratory judgment suit attacking the constitutionality of a New Jeresy State statute. Relief was premised, in part, on 42 *U.S.C.* §1983, which prohibits certain action under color of State law. The only action complained of here, however, was the adoption of the challenged statute by the New Jersey Legislature. The actual named State defendants neither took nor threatened to take any action to enforce the statute against plaintiffs or anyone else.

On August 29, 1980, plaintiff Marijane Singer and ten other individuals who were or had been "special State officers or employees," *N.J.S.A.* 53:13D-13(e), within the meaning of the New Jersey Conflicts of Interest Law, *N.J.S.A.* 52:13D-12 *et seq.*, filed a seven-count Complaint (Appendix G; A46 to A69) challenging the validity of

L. 1980, *c.* 79 (Appendix A; A1 to A4), commonly known as the casino ethics amendment, which imposed restrictions on the business activities and financial interests of special State officers or employees with respect to casino licenses or applicants. *L.* 1980, *c.* 79 (then Senate Bill 1068 of 1980)(Appendix A; A1 to A4) amended *N.J.S.A.* 52:13D to provide that no special State officer or employee shall accept employment with any casino licensee or applicant for a casino license. This prohibition extended for a period of two years after the termination of State service. *N.J.S.A.* 52:13D-17.1. The restrictions extended to any partnership, firm or corporation with which a special State officers was associated and all partners, officers and employees of such entities. *N.J.S.A.* 52:13D-16(b).

Persons found gulity of violating the Act were subject in proceedings before defendant Executive Commission on Ethical Standards to prosecution for a fine of between $100 and $500, suspension from public service, *N.J.S.A.* 52:13D-21(i) (Appendix B; A5 to A7), and/or prosecution as a disorderly person. *L.* 1980, *c.* 79, §2.e (A4).

The passage of *c.* 79 was part of a comprehensive reform of the casino gaming industry that took place in New Jersey in 1980 following the Abscam revelations in the spring of that year linking several New Jersey public officials to illegal efforts to influence the State's supervision over casino gambling.* The Legislature's adoption of *c.* 79 placing restrictions on the activities of special State officers was in pursuance of fulfilling its earlier declaration that

---

* Also passed into law were *L.* 1980, *c.* 28 (reconstituting the Casino Control Commission as a full-time body) (Appendix D; A12 to A29); *L.* 1980, *c.* 69 (placing prohibitions on the outside employment of Commission members) (Appendix E; A30 to A41); *L.* 1980, *c.* 159 (regulating junkets and complimentary casino services) (Appendix F; A42 to A45).

> An integral and essential element of the regulation and control of such casino facilities by the State rests in public confidence and trust in the credibility and integrity of the regulatory process and of casino operations. ["Casino Control Act," *N.J. S.A.* 5:12-1 *et seq.*, 5:12-1.b(6)]

Defendant former Governor Brendan T. Byrne allowed *c.* 79 to become law without his signature on July 29, 1980. At the time he publicly expressd his doubts regarding the constitutionality of the Act, particularly about its overbreadth (A9). Nevertheless, the Governor was not in a position to veto Senate Bill 1068. *L.* 1980, *c.* 28 (Appendix D; A12 to A29), which had been approved May 20, 1980, was a central element of casino regulation reform; it reconstituted a part-time Casino Control Commission into a fulltime body owing no allegiance to anyone but the public. However, the Legislature made the effectiveness of this linchpin of casino reform contingent upon the adoption into law of Senate Bill 1068 (later *c.* 79) and Senate Bill 1069 (subsequently *L.* 1980, *c.* 69, a law placing prohibitions on the outside employment of Casino Control Commission members) (Appendix E; A30 to A41; §5.a, A41). Thus, Governor Byrne allowed Senate Bill 1068 to become law as *c.* 79 because "only by its enactment could the reform of Casino Control Commission into a full-time body take effect." Veto Message to Senate Bill 1369 (1980) (Appendix C; A9).

At the time *c.* 79 became law, Governor Byrne warned that its provisions would discourage volunteer service on many State boards and commissions (A9). Subsequently, as Governor Byrne feared, some 180 special State officers did resign their positions to avoid the impact of *c.* 79 (A9). He promised to reappoint those who resigned upon the passage of supplemental legislation, and he continued

to press for a legislative revision. A revised casino ethics bill become law on May 14, 1981. *L.* 1981, *c.* 142. Governor Byrne fulfilled his previous promise and offered to reappoint those persons who had resigned because of the adoption of *c.* 79.

The Complaint (Appendix G; A46 to A69) challenging *c.* 79 named as defendants the State of New Jersey, Governor Byrne, the Department of Law and Public Safety, the Attorney General, the Executive Commission on Ethical Standards and six individual members of the Commission, and sought as relief a judgment declaring *L.* 1980, *c.* 79 unconstitutional, an injunction barring its enforcement, damages and costs. Counts I through II and III through IV were based, respectively, on alleged violations of federal and State constitutional law. Count VII presented a breach of contract claim.

Requested relief based on 42 *U.S.C.* §1983 was asked against the individual defendants in Counts V and VI (A65 to A67). The allegations in those two counts asserted that the passage of the casino ethics amendment deprived plaintiffs of federal constitutional rights guaranteed to them under the First and Fourteenth Amendments. For example, most of the allegations in Counts V and VI, based on §1983, commence as follows: "The Act has violated and continues to violate the following rights . . ." (A52); "The Act constitutes a bill of attainder" (A53); "The Act impairs the obligations of . . . contract" (A54); and "The Act has had direct, immediate, irreparable, substantial and damaging effects" (A54). There is no allegation to be found anywhere in Count V or Count VI, however, asserting that any of the defendants ever took or threatened to take any action to enforce the provisions of *L.* 1980, *c.* 79. Defendants' Answer specifically denied any action on their part (Appendix I; A72 to A77, A80).

In an oral opinion rendered November 25, 1980 (Appendix J; A78 to A84) in response to cross-motions for summary judgment, the Hon. George Y. Schoch, Judge, Superior Court, granted the declaratory and injunctive relief sought by Counts I through IV on the ground that the statute was overbroad, ambiguous and not rationally related to any legitimate governmental interest insofar as it affected special State officers or employees (A78 to A84). However, the court denied the claim for damages and granted final summary judgment for defendants on the §1983 claims contained in Counts V and VI and in the Count VII contract claims. *Ibid.* The court also denied plaintiffs' subsequent motion for attorneys' fees pursuant to 42 *U.S.C.* §1988 ,which provides that the court may, in its discretion, award reasonable attorney's fees to a prevailing party in any suit to enforce 42 *U.S.C.* §1983.

Thereafter, appellants filed a Notice of Appeal to the Appellate Division, Superior Court, from the trial court's entry of judgment for defendants as to Counts V and VI under §1983 and its denial of attorneys' fees under §1988. The State defendants did not appeal the declaration of invalidity on federal constitutional grounds of *c.* 79.

The Appellate Division issued its decision in this matter on June 1, 1982, and reversed the trial court insofar as Judge Schoch concluded that defendants were entitled to summary judgment on the Counts V and VI §1983 claims and insofar as he denied plaintiffs' application for attorneys' fees under §1988 (Appendix L; A88 to A92). The appellate panel held that the existence of a violation of the Fourteenth Amendment was synonymous with a violation of 42 *U.S.C.* §1983 (A89 to A90). Accordingly, it also determined that an attorneys' fee award under 42 *U.S.C.* §1988 could be awarded against the defendants (A90).

Thereafter, the Supreme Court of New Jersey granted defendants' Petition for Certification and issued its opin-

ion in this matter on March 19, 1984. *Singer* v. *State*, 95 *N.J.* 487, 472 *A.*2d 138 (1984) (Appendix M; A93 to A109). The Supreme Court, relying on this Court's decision in *Supreme Court of Virginia* v. *Consumers Union, Inc.*, 446 *U.S.* 719 (1980),* held that the existence of enforcement authority, coupled with the duty to enforce, was a sufficient basis upon which to award attorney's fees under 42 *U.S.C.* §1988. *Singer* v. *State*, 95 *N.J.* at 493-494, 472 *A.*2d at 141 (A99). The Supreme Court, like the Appellate Division, equated a declaration of invalidity on federal constitutional grounds with success under §1983. Said the court: "Even without succeeding on their section 1983 claim, plaintiffs obtained substantially all of the relief they sought." *Id.*, 95 *N.J.* at 496, 472 *A.*2d at 142 (A102).

The court remanded the matter to the trial court for a determination of reasonable attorney's fees under §1988. *Id.*, 95 *N.J.* at 501-502, 472 *A.*2d at 145 (A108).

---

* The initial decision of the three-judge court in this matter is reported at *Consumers Union of U.S., Inc.* v. *American Bar Ass'n*, 427 *F. Supp.* 506 (E.D. Va. 1976) (Consumers Union I); this Court vacated that judgment at *Consumers Union of U.S., Inc.* v. *Virginia State Bar*, 433 *U.S.* 917 (1977) (Consumers Union II); on remand the three-judge court assessed attorney's fees at *Consumers Union of U.S., Inc.* v. *American Bar Ass'n*, 470 *F. Supp.* 1055 (E.D. Va. 1979) (Consumers Union III); this Court vacated and remanded at *Supreme Court of Virginia* v. *Consumers Union, Inc.*, 446 *U.S.* 719 (1980) (Consumers Union IV); on remand the three-judge panel assessed fees in part at *Consumers Union of U.S., Inc.* v *.American Bar Ass'n.*, 505 *F. Supp.* 822 (E.D. Va. 1981) (Consumers Union V); that decision was modified on appeal at *Consumers Union of U.S., Inc.* v. *Virginia State Bar*, 688 *F.*2d 218 (4th Cir. 1982) (Consumers Union VI); this Court denied *certiorari* at *Virginia State Bar* v. *Consumers Union of U.S., Inc.*, —— *U.S.* ——, 103 *S.Ct.* 3124 (1983) (Consumers Union VII); Chief Justice Burger and Justice Rehnquist dissented from the denial of *certiorari* at *Supreme Court of Virginia* v. *Consumers Union of U.S., Inc.*, —— *U.S.* ——, 103 *S.Ct.* 3124 (1983) (Consumers Union VIII).

ARGUMENT

The Court should grant certiorari to settle the unresolved issue of whether attorney's fees may be awarded under 42 *U.S.C.* §1988 even though none of the defendants took or threatened to take any action to enfore *L.* 1980, *c.* 79 which would subject them to liability under 42 *U.S.C.* §1983; also, attorney's fees should be denied in this case because there are "special circumstances" which would render an award of fees "unjust".

This case is of major significance because it raises the unique issue of whether attorney's fees may be awarded under 42 *U.S.C.* §1988 to plaintiffs who, although successfully pursuing a declaratory judgment action clarifying the validity of a State of New Jersey statute, were never subjected to an enforcement action under the statute or even threatened with one. The resolution of this issue is of great importance to the State of New Jersey and its officials because they are routinely named as nominal defendants in lawsuits challenging a statute despite their passive stance in enforcing the statute. The logical defendants in such actions attacking the mere passage of a statute are the individual legislators who adopted it. They, however, possess absolute immunity from suit, including an award of attorney's fees. *Consumers Union IV, supra,* 446 *U.S.* 719.

Exposure of the State, and its non-legislative officers to counsel fee awards in every declaratory judgment action decided on a federal constitutional basis, but incapable of supporting a §1983 claim for relief because the requirement of State enforcement action goes unfulfilled, would subject the State treasury to a substantial financial drain. Moreover, this would impose liability in circumstances

specifically considered and rejected by Congress when it passed the "Civil Rights Attorney's Fees Awards Act of 1976" as an amendment to 42 *U.S.C.* §1988. In addition, this case presents the Court with the opportunity to address when an award of attorneys' fees should be precluded or reduced, if ever, for reasons of "special circumstances." For all of these reasons, amplified below, this case warrants that *certiorari* be granted.

A. Plaintiffs are not entitled to an award of attorney's fees under 42 *U.S.C.* §1988 because they have not met the prerequisites for obtaining relief under any of the civil rights statutes listed in 42 *U.S.C.* §*1988, specifically* 42 *U.S.C.* §1983, which entitles a prevailing party to an award of attorney's fees.

In *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 *U.S.* 240 (1975), this Court held that federal courts did not have the power to award attorney's fees to a prevailing party unless expressly provided for by statute. The Court reversed an award of fees to plaintiffs who had succeeded in litigation preventing construction of the Alaskan pipeline because of environmental damage, citing the "American Rule" that each litigant, whatever the outcome, must pay his own attorney's fees. Although the *Alyeska* case involved an environmental matter, it had the effect of precluding fee awards in a wide-range of matters, including civil rights cases, whenever there was no express statutory authorization for attorney's fee awards. *Id.,* 421 *U.S.* at 270, n. 46. Prior to the *Alyeska* decision, federal courts had been awarding attorney's fees to prevailing plaintiffs in civil rights cases under an equitable theory that when plaintiffs succeeded in eliminating discriminatory practices they were acting as "private attorneys general." *See Newman* v. *Piggie Park Enterprises, Inc.,* 390 *U.S.* 400, 402 (1968). In *Alyeska,* the

Court rejected that theory as a basis for fee awards in the absence of express statutory authorization.

In the aftermath of *Alyeska,* Congress adopted the "Civil Rights Attorney's Fees Awards Act of 1976." It provides in pertinent part:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the Court in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs. [42 *U.S.C.* §1988]

The express language of the statute makes it clear that attorney's fee awards are limited to actions grounded on the specific sections of the United State code enumerated in the Act. It is thus important with respect to this case to note that among the provisions of the United States Code not listed in §1988 are 28 *U.S.C.* §2201 and §2202 which provide for declaratory judgment proceedings. The legislative history of the Act also clearly distinguishes between actions based on violations of the federal Constitution, for which fees cannot be awarded, and actions premised on the listed United States Code sections, including §1983, which will support a fee award to a prevailing plaintiff. The House of Representatives Report No. 94-1558 (Appendix O; A122 to A142) recites that the House considered three different bills to provide for attorney's fee awards in civil rights cases:

> At the time of the Subcommittee hearings on October 6 and 8, and Dec. 3, 1975, three bills were pending which dealt expressly with counsel fees in civil rights cases: H.R. 7828 (same as H.R. 8220); H.R. 7969 (same as H.R. 8742); and H.R. 9552.

> H.R. 7828 and H.R. 9552 would allow attorney fees to be awarded in cases brought under specific provisions of the United States Code, while H.R. 7969 would permit such awards in any case involving civil or constitutional rights, no matter what the source of the claim. H.R. 7828 was stated in mandatory terms; H.R. 9552 and H.R. 7969 allowed discretionary awards. [H.R. Rep. No. 1558, 94th Cong., 2d Sess. 3 (1976) (A126)]

The Congress, significantly, never acted on the version that would have allowed fees in any case, whether based on Constitution or United States Code provision. Instead, the Congress adopted S. 2278 (a successor bill to H.R. 9552), now embodied in §1988, which permits fee awards only in cases brought under the specific sections of the United States Code listed therein.

The Supreme Court of New Jersey erroneously concluded that because plaintiffs succeeded in invalidating the casino ethics amendment on a federal constitutional ground, *i.e.* the Fourteenth Amendment, they were likewise entitled to a judgment in their favor on Counts V and VI of their Complaint seeking relief pursuant to §1983. *Singer* v. *State, supra.* Having so concluded, the court then decided attorney's fees could be awarded under §1988. The court, however, failed to address the fact that none of the defendants either took or threatened plaintiffs with any enforcement action under the statute that would be supportive of a §1983 remedy. In fact, the Complaint itself does not challenge any action taken pursuant to the statute, but simply questions the existence of the statute itself.

As the legislative history makes clear, however, it is essential that before awarding fees under §1988, a court must determine that one of the code sections enumerated

in §1988 has been violated. This inquiry has become necessary only after the decision in *Alyeska* because prior to that time, as noted above, fees were awarded under the equitable theory of "private attorneys general." *Newman* v. *Piggie Park Enterprises, Inc.*, 390 *U.S.* at 402. Thus it was simply not necessary to pinpoint whether the basis for awarding fees stemmed from a constitutional or a statutory violation. *See* H.R. Rep. No. 1558, 94th Cong., 2d Sess. 4, n. 7 (1976) (Appendix O; A128). *Maine* v. *Thiboutot*, 448 *U.S.* 1, 10, n. 10 (1980). The adoption of §1988 has, however, made such a determination critical.

Thus, while a favorable judgment on a §1983 claim will not always be necessary to support a fee award, that rule applies only when the court does not decide the merits of the §1983 claim but the plaintiff otherwise obtains substantiallly all the relief sought by way of settlement or by resolution of the case in a manner which avoids determination of the constitutional issue presented by the §1983 claim. *Maher* v. *Gagne*, 448 *U.S.* 122 (1980). In this case, however, the trial court did not avoid resolution of the constitutional issue by deciding the case on a non-§1983 ground. The trial court faced the constitutional grounds, and decided them in plaintiffs' favor, but it rendered an adverse judgment on the §1983 counts. Under such circumstances, where the §1983 claim has been specifically considered and rejected by the court, there is no basis to award fees. *Luria Brothers & Co., Inc.* v. *Allen*, 672 *F.*2d 347 (3rd Cir. 1982). The court in *Luria Brothers* stated the issue as follows:

> Here the district court did reach both the federal constitutional question and the related state law question, and here we have concluded that the claimant of the attorney's fees has not prevailed in the §1983 claim. Thus, the question reduces itself to one of statutory construction: if, as a result of an

> adjudication, one is the losing and not the prevailing party on a §1983 claim, may he be entitled nevertheless to attorney's fees on the strength of his success on a related state law claim? We do not think so. [*Id.*, 672 *F.*2d at 357]

In *Luria Brothers,* plaintiffs prevailed on their state law claim. In this case, plaintiffs prevailed on their federal constitutional claim. As the legislative history to §1988 makes clear, however, that is not the critical factor. *See* H.R. Rep. No. 1558, 94th Cong., 2d Sess. 4, n. 7 (1976) (Appendix O; A128). *Maine* v. *Thiboutot,* 448 *U.S.* at 10, n. 10. What is determinative of the fees question is that the plaintiffs in each case lost on their §1983 claims. Here, the trial court correctly concluded that plaintiffs were not entitled to judgment on their §1983 counts. The New Jersey Supreme Court was in error when it equated a violation of the Fourteenth Amendment with a violation of §1983.

42 *U.S.C.* §1983 provides in pertinent part that:

> Every person who, under color of any statute . . . of any State . . . *subjects, or causes to be subjected,* and citizen of the United States or other person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. (emphasis added)

Two elements must be satisfied in a §1983 action. First, there must be a showing by plaintiffs of a deprivation of a right secured by the federal Constitution or laws. Secondly, there must be *action* by the defendants under color of state law. *Flagg Brothers, Inc.* v. *Brooks,* 436 *U.S.* 149 (1978); *Adickes* v. *S.H. Kress and Company,* 398

U.S. 144 (1970). The action requirement contained in §1983, passed after the Civil War to protect against coercive acts of state government officials, creates in effect a "constitutional tort." *Monell* v. *Department of Social Services,* 436 *U.S.* 658 (1978); *Imbler* v. *Pachtman,* 424 *U.S.* 409 (1976). Since §1983 is premised on principles of tort law, liability can only be established when there has been personal involvement with knowledge and pursuant to the challenged statute. *Adickes* v. *S.H. Kress and Company,* 398 *U.S.* at 162, n. 23; *Monroe* v. *Pape,* 365 *U.S.* 167 (1961). Consequently, it is the requirement of wrongful *action* as a predicate to liability that precludes the application of principles of respondeat superior or vicarious liability in §1983 lawsuits. *Rizzo* v. *Goode,* 423 *U.S.* 362 (1976).

In this matter, it is clear that none of the named defendants ever engaged in any acts which would subject them to liability under §1983. The Governor allowed *L.* 1980, *c.* 79 to become law without his signature and publicly expressed his doubts about *c.* 79's constitutionality (A9). He only allowed *c.* 79 to become law because its enactment was a condition precedent to the effectiveness of a law establishing the essential reform of a full-time Casino Control Commission. The Attorney General never took nor threatened to take any steps to enforce the provisions of the casino ethics amendment against plaintiffs. Nor did the members of the Executive Commission on Ethical Standards engage in any activity that could be characterized as an act, or threatened act of enforcement. Moreover, plaintiffs never even alleged in their Complaint (Appendix G; A46 to A69) that the defendants acted, or intended to act adversely to them. Nor did they seek any temporary restraints against *c.* 79's enforcement for the nearly four months between the time *c.* 79 became law and the time it was declared unconstitutional by the trial court.

Indeed, every allegation contained in the §1983 Counts V and VI of plaintiffs' Complaint is concerned not with acts committed by the defendants but by harm asserted to flow directly from the adoption of the casino ethics amendment. Their real complaint thus challenges nothing more than the existence of the statute itself.

Furthermore, the mere existence of enforcement authority, unexercised or unthreatened, is not enough to sustain a §1983 claim for purposes of an attorney's fees award. Indeed, enforcement authority alone and unexercised has been held to be insufficient to create a case or controversy under §1983. *O'Shea* v. *Littleton,* 414 *U.S.* 488 (1974); *Boyle* v. *Landry,* 401 *U.S.* 77 (1971). *See Consumers Union IV,* 446 *U.S.* at 736, n. 15. *Accord Gras* v. *Stevens,* 415 *F.Supp.* 1148 (S.D. N.Y. 1976) (general duty of Governor and Attorney General to enforce state law doesn't confer §1983 jurisdiction); *Fialkowski* v. *Shapp,* 405 *F.Supp.* 946 (E.D. Pa. 1975) (mere allegation the Attorney General had duty to enforce law warranted dismissal of suit). If enforcement authority alone cannot meet basic jurisdictional prerequisites for a §1983 claim, then it must be perforce conceded that the existence of mere enforcement authority may not sustain a §1983 claim for purposes of an award of attorney's fees under §1988.

In *Consumers Union VI, supra,* 688 *F.*2d 218, the Fourth Circuit did not hold that mere enforcement authority alone is sufficient to create a case or controversy under §1983 and to sustain a fee award. Rather, the Circuit relied upon the earlier language in this Supreme Court's decision indicating that the Virginia Supreme Court had conceded its liability under §1983 and therefore provided the basis for a fee award against it.

This view of the Fourth Circuit's ruling is buttressed by the memorandum decision filed by Chief Justice Burger and joined by Justice Rehnquist dissenting from the denial of *certiorari, supra,* —— *U.S.* ——, 103 *S.Ct.* 3124. They observed:

> We held in *Consumers Union* that the Virginia Court was a proper defendant in a coercive §1983 suit because it had the potential power to prosecute attorneys for disciplinary violations. However, there was no evidence in the record that it had ever exercised its enforcement powers. After vacating the award because it was premised on acts—the promulgation and failure to amend the challenged disciplinary rules—for which the Virginia Court was entitled to absolute legislative immunity, we remanded the case. If we had thought that the mere existence of enforcement authority would support the award, there would have been no need to remand as to the Virginia Court. Thus, we necessarily remanded for further findings on the Virginia Court's actual exercise of its enforcement powers, and for consideration of whether such acts justified a fee award against the court.
>
> On remand, the District Court took no evidence as to the Virigina Court's actual role in enforcing the challenged rule; in reinstating the award, it relied solely on the mere existence of disciplinary authority. 505 *F.Supp.,* at 823-824. In short, the fee award rests on the same basis now—the Virginia Court's promulgation of disciplinary rules—that it did before. The District Court's reliance on the Virginia Court's potential 'disciplinary enforcement authority' cannot cover up the utter lack of proof in the record that the Virginia Court ever did anything to enforce the rule. Thus, the fee award cannot stand.

> For all the foregoing reasons, I would grant *certiorari* to consider the important question of whether an award of attorney's fees against a judge may be premised solely on the existence of enforcement authority. [*Id.*, —— *U.S.* ——, 103 *S.Ct.* at 3127]

Since all of the named defendants herein assumed a passive stance with respect to enforcing *L.* 1980, *c.* 79, and thus did not engage in any action against plaintiffs, it was erroneous for the Supreme Court of New Jersey to find liability against the defendants under §1983. The fact of the matter is that the State officials charged here were just as concerned as plaintiffs in having the legal status of *L.* 1980, *c.* 79 clarified. The traditional and appropriate procedure to construe the validity of a statute is to obtain a declaratory judgment and, when appropriate, an injunction enforcing that declaration. 28 *U.S.C.* §§2201 and 2202; *N.J.S.A.* 2A:16-50 *et seq.* In fact, the New Jersey Supreme Court has consistently expressed its preference that the appropriate way to challenge the constitutionality of a statute is by a suit for declaratory judgment and not by inviting a civil or criminal prosecution. *State* v. *Baird*, 50 *N.J.* 376, 378-379, 235 *A.*2d 673, 674 (1967); *Lucky Calendar Co.* v. *Cohen*, 19 *N.J.* 399, 408-409, 117 *A.*2d 487, 492 (1955).

Such actions allow the adjudication of legal rights and duties without the need to resort to coercive State action necessitating a prior breach or a violation of a constitutional right. It is for this reason that it is significant that Congress omitted the federal declaratory judgment provisions, 28 *U.S.C.* §§2201 and 2202, from the list of code sections enumerated in §1988 for which counsel fees could be awarded. Plainly, Congress did not intend attorney's fees to be awarded in cases where governmental officials never acted adversely to prevailing plaintiffs, even

where the challenged statute is struck down on federal constitutional grounds. *See Maine* v. *Thiboutot,* 448 *U.S.* at 5-6 (recognizing that constitutional claims are distinct from a §1983 claim). This is logical since until the state officials act, or threaten action, there is no harm.

If the New Jersey Supreme Court decision in this matter is allowed to stand, it will convert every declaratory judgment action decided on federal constitutional grounds into a §1983 action with accompanying counsel fee awards under §1988. Such lawsuits are frequent and routine and have the potential of placing a severe drain on the State's limited financial resources. In addition such a rule could have a severe and detrimental impact on State officers. The present policy of the State of New Jersey is, generally, to indemnify State officers against §1983 judgments. However, the §1983 judgments usually run against the individual defendant who, most often, is sued in both his official and individual capacity. The degree of indemnification depends on the availability of State funds. In the event State funds are insufficient, the State officer would be individually and personally liable for the unsatisfied judgment. Under the State Supreme Court's decision, such an individual would find himself liable for an award of attorney's fees even though he had not taken or threatened any action against plaintiffs. The State officer would be held financially accountable simply by virtue of holding a particular State office. Such a result would be plainly contrary to the requirement of personal involvement fundamental to a §1983 claim.

As noted above, Congress considered and rejected an approach that would have permitted fee awards in civil rights cases for violations of both the federal Constitution and statutory provisions. Instead, it adopted a fees act that permits counsel fee awards only in cases grounded on the specific United States Code sections listed in §1988.

Congress specifically included §1983-based claims, but a successful §1983 claim contains as one of its two elements a requirement of State action. That prong was not satisfied in this case. As this Court has observed:

> Where . . . a federal right is at issue, the statutory concept of action under color of state law [in §1983] would be a distinct element of the case not satisfied implicitly by a finding of a violation of the particular federal right. [*Lugar* v. *Edmondson Oil Co., Inc.*, 457 *U.S.* 922, 935, n. 18 (1982)]

Congress also pointedly did not include declaratory judgment actions within the ambit of §1988. That is the type of case presented here. Accordingly, the New Jersey Supreme Court erred when it treated the declaration of invalidity of *c.* 79 in violation of the Fourteenth Amendment as the equivalent of a cause of action under §1983. They are clearly different, and it is essential to explore that distinction when considering fee awards under §1988. This Court should grant *certiorari* to settle these unresolved issues.

B. "Special Circumstances" would render an award of attorney's fees in this case "unjust" since the State defendants did not take action or threaten to enforce the challenged State law and since no such action was even alleged in plaintiffs' complaint.

Although under §1988 reasonable attorney's fees should ordinarily be awarded to the prevailing party, it has been held that a counsel fee award may nevertheless be properly denied whenever "special circumstances would render such an award unjust." *Newman* v. *Piggie Park Enterprises, Inc.*, 390 *U.S.* 400, 402 (1968). That standard was incorporated in the legislative history of the Fees Act,

S. Rep. No. 1011, 94th Cong., 2d Sess., *reprinted in* 1976 U.S. Code Cong. & Ad. News 5908, 5912 (Appendix N; A117), and has since been reiterated by this Court. *Hensley* v. *Eckerhart*, —— *U.S.* ——, 103 *S.Ct.* 1933, 1937, 76 *L.Ed.* 2d 40 (1983).

Subsequent judicial interpretation of the "special circumstances" doctrine, however, has narrowly circumscribed its application so that it is devoid of any real meaning. Although some courts have invoked "special circumstances" to preclude an award of attorneys' fees, *Chastang* v. *Flynn & Emrich Co.*, 541 *F.*2d 1040, 1045 (4th Cir. 1976); *Naprstek* v. *City of Norwich*, 433 *F.Supp.* 1369 (N.D. N.Y. 1977), the overwhelming majority have rejected most arguments advanced as special circumstances. *See Konczak* v. *Tyrrell*, 603 *F.*2d 13, 19 (7th Cir. 1979), *cert. denied* 444 *U.S.* 1016 (1980) (that litigation benefited only named plaintiffs and not a larger class); *Coop* v. *City of South Bend*, 635 *F.*2d 652 (7th Cir. 1980) (that plaintiffs won only nominal damages); *Staten* v. *Housing Auth. of Pittsburgh*, 638 *F.*2d 599 (3rd Cir. 1980) (that plaintiff's case was simple); *Coop* v. *City of South Bend*, 635 *F.*2d at 655 (that plaintiff declined to settle); *Entertainment Concepts, Inc.* v. *Maciejewski*, 631 *F.*2d 497 (7th Cir. 1980) (that governmental defendant is financially troubled); *Criterion Club of Albany* v. *Board of Comm'rs.*, 594 *F.*2d 118, 120 (5th Cir. 1979) (that most of the fee request was for time spent on fee issue itself). And in *Consumers Union VI*, the Fourth Circuit modified the judgment of the three-judge panel which had held that "special circumstances" made an award of fees against the Virginia State Bar "unjust" and awarded fees. *Id.*, 688 *F.*2d at 221-222.

It would thus be appropriate and helpful for this Court to address what constitutes "special circumstances" in a particular case and whether that doctrine has any continuing validity. For example, in this matter the Court

should consider, if it determines that a fee award may be made, that the defendants uniformly took a passive stance with respect to enforcing the challenged statute, that the Governor publicly declared his doubts about *c.* 79's unconstitutionality and that the defendants at all times acted in good faith. It should consider that the passage of *c.* 79 was a condition precedent to the creation of a full-time Casino Control Commission. Another factor to be weighed is that the real act complained of is the passage of the statute itself, something outside the control of the defendants and an action normally entitled to absolute legislative immunity. (The Governor's review of bills passed by the State Legislature is likewise a legislative function. *Gilbert* v. *Gladden,* 87 *N.J.* 275, 432 *A.*2d 1351 (1981)). In addition, it is important that in this case plaintiffs initiated this lawsuit to clarify their right to hold appointed political offices which they have no liberty, property or other constitutional interest to occupy.

CONCLUSION

Certiorari should be granted because the Supreme Court of New Jersey erroneously concluded that attorney's fees could be awarded in this case under §1988. This conclusion is wrong because it is premised on the notion that the finding of a federal constitutional violation invalidating the challenged statute is equivalent to satisfying a cause of action under §1983 supportive of a fee application under §1988. This is not so, however, because to establish a successful claim under §1983 it is necessary to show that the defendants engaged in conduct harmful to plaintiffs. In fact, defendants neither took nor threatened any action against plaintiffs. Nor does plaintiffs' Complaint even allege any wrongful action by defendants. Plaintiffs'

Complaint asserted harm flowing solely from the adoption of the challenged statute by the State Legislature. If fees were awarded in this case, it would subject the State, and possibly the individually named defendants, to substantial financial liability. This result would be contrary to the intention of Congress when it adopted the "Civil Rights Attorney's Fees Awards Act of 1976." The legislative history demonstrates Congress intended counsel fees to be awarded only for actions based on the United States Code sections enumerated in §1988, and it did not include §2201 (declaratory judgment proceedings) in that list.

For the foregoing reasons, it is submitted that this Court should grant a writ of *certiorari* to review and ultimately reverse the decision of the Supreme Court of New Jersey in this matter.

Respectfully submitted,

IRWIN I. KIMMELMAN
Attorney General of New Jersey
Attorney for Petitioners

MICHAEL R. COLE
First Assistant Attorney General
Counsel of Record

WILLIAM HARLA
Deputy Attorney General
On the Petition

Dated: June 14, 1984